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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1327

JOHN E. SAVAGE and THE LORRAINE CORPORATION, a Corporation,

Petitioners,

vs.

DAVID G. LORRAINE and L. F. BAASH, Receiver,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause [R. 1261], affirming the judgment and five supplemental orders of the District Court of the United States for the Southern District of California, Central Division. [R. 184, 212, 276, 294, 299 and 1243.]

Opinions Below.

The opinion of the Circuit Court of Appeals is printed at page 1258 of the Record. The District Court did not render an opinion.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on March 30, 1945. [R. 1261.] A timely petition for rehearing was denied on April 30, 1945. [R. 1262.] The jurisdiction of this Court is invoked under Section 240(2) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

The questions presented are:

Question 1. Can an implied trust in property (600,-472.65 shares of corporate stock) bought by petitioner John E. Savage with his own money and to which he took title in his own name, be declared in favor of the respondent David G. Lorraine upon testimony which is not *"clear, convincing, and conclusive,"* as required by

(a) the decisions of the Supreme Court of the United States,

(b) the decisions of other Circuit Courts of Appeals of the United States, and

(c) in a case where the jurisdiction of the Federal Courts attached solely because of diversity of citizenship, and where all the transactions took place in California, whose law as declared by its Supreme Court is that the rule of evidence to be applied in such cases is that the "testimony must be clear, convincing and conclusive."

The Court below held that the action was "grounded in breach of contract" and refused to consider the testimony in the light of the rule of the decisions of this Court and of those Circuit Courts of Appeals of other circuits and the Supreme Court of California. [R. 1259.]

Question 2. Is respondent David G. Lorraine estopped from asserting any claim to the 600,472.65 shares of stock when at the time of and before the consummation of the purchase thereof by the petitioner John E. Savage, said respondent David G. Lorraine signed a statement to the effect that he "will not at any time assert any claim or title to said 650,472.65 shares of stock," as is provided by

(a) the decisions of the Supreme Court of the United States,

(b) the decisions of other Circuit Courts of Appeals of the United States, and

(c) in a case where the jurisdiction of the Federal Courts attached solely because of diversity of citizenship, and where all the transactions took place in California, whose law as declared by its Supreme Court is that he is estopped from asserting any claim.

The Court below held that such proof "lacks elements essential to estoppel." [R. 1260.]

Question 3. Was it proper for the District Court to appoint a receiver for petitioner The Lorraine Corporation on the motion of respondent Lorraine because said corporation had been forced to borrow $25,000 from petitioner John E. Savage, when he, said respondent David G. Lorraine, had himself created the situation making such borrowing necessary by causing the Douglas Aircraft Company, Inc., one of the debtors of the corporation, to withhold payment to the corporation of $64,572.34, and especially where such debtor through its attorney, who was also attorney for the respondent Lorraine, proposed to the District Court that if said Court would appoint a receiver for petitioner The Lorraine Corporation satisfactory to said Douglas Aircraft Company, Inc., said Douglas Aircraft Company, Inc., would pay such receiver

$20,000 on account of its debt, provided such funds would be used by the receiver to repay the advances made by Mr. Savage to the corporation as required to be repaid by the judgment of the District Court in order to entitle respondent David G. Lorraine to receive said shares of stock?

The District Court accepted the proposal of Mr. Elliott, the attorney for the respondent David G. Lorraine and the Douglas Aircraft Company, Inc., appointed the receiver and instructed the receiver to accept $20,000 on account from the Douglas Aircraft Company, Inc., and use $15,843.28 thereof to repay to the petitioner John E. Savage the money he had advanced to petitioner The Lorraine Corporation prior to the date of the entry of the judgment.

The Court below held that these "orders are a matter of secondary consequence, and our disposition of the main appeal renders them of little more than academic interest to appellant" John E. Savage and that the appeals thereon were without merit, ignoring the fact that there were other stockholders of the petitioner The Lorraine Corporation besides the parties to this suit whose interests were vitally effected by the order appointing the receiver. [R. 1261.]

Question 4. Was it proper for the District Court to direct the receiver to give $27,804 of the assets of petitioner The Lorraine Corporation to the Douglas Aircraft Company, Inc., without any proof whatsoever that such sum or any part of it was due? As a matter of fact, both the receiver and Mr. Elliott, the attorney for David G. Lorraine and the Douglas Aircraft Company, Inc., testified that they had made no investigation of the facts and did not know whether any amount was owing to the Douglas Aircraft Company, Inc., and the Douglas Aircraft

Company, Inc., itself never filed any claim against the petitioner, The Lorraine Corporation.

The Court below held that the appeals on these orders were "of secondary consequence," and "of little more than academic interest to" petitioner John E. Savage and "without merit," ignoring the fact that it was of vital interest to petitioner The Lorraine Corporation and its stockholders other than the parties to this litigation by the order directing the respondent receiver to give away $27,804 of the assets of their corporation.

The Circuit Court of Appeals affirmed the judgment of the District Court. [R. 1261.]

Statement of the Case.

On May 19, 1942, respondent David G. Lorraine and his wife Sara R. Lorraine employed the petitioner John E. Savage, a licensed broker, to negotiate with prospects said respondent and his wife had for the purpose of refinancing petitioner The Lorraine Corporation and purchasing 650,472.65 shares of its stock owned by Lawrence Cobb but pledged to Rose Lorraine (former wife of respondent David G. Lorraine) as collateral to three promissory notes executed by said Lawrence Cobb to said Rose Lorraine. [R. 339, 367-370, 620-621.] The petitioner John E. Savage accepted the employment and carried on negotiations with said prospects. On June 1, 1942, it looked as if a deal might be closed with one Marcel Roman, one of the above mentioned prospects [R. 789, 797], and respondent David G. Lorraine suggested that a written contract setting forth the terms under which petitioner John E. Savage was employed should be drawn up and signed [R. 628], and Plaintiff's Exhibit 1 [R. 335] was drawn up and executed. [Appendix p. 1.]

On June 12, 1942, the U. S. Internal Revenue Department distrained all the assets of The Lorraine Corporation under its tax lien of $23,091.45 and proceeded to take an inventory preparatory to a sale thereof. [R. 692.]

The deal with Mr. Roman fell through on June 16. [R. 593, 609, 819.] It then became apparent that Rose Lorraine would foreclose the Cobb notes, acquire 650,472.54 shares of the 1,194,500 outstanding shares of stock, and oust both respondent David G. Lorraine and his second wife, Sara R. Lorraine, from all connection with The Lorraine Corporation; and unless a substantial sum of money was paid to the U. S. Internal Revenue Department, they would proceed to sell the assets of the petitioner The Lorraine Corporation and render worthless the 448,624.50 shares of stock owned by respondent David G. Lorraine, his wife Sara R. Lorraine and his daughter Sally Lorraine. [R. 703.]

Respondent David G. Lorraine then proposed that petitioner John E. Savage put up his own money and buy the stock for himself. [R. 812-817.]

Petitioner John E. Savage accepted the proposal, contingent upon his being able to make satisfactory arrangements for the purchase of 600,472.65 shares of the stock held by Mr. Henry G. Bodkin, the attorney for Rose Lorraine, as collateral for said notes, for an extension of time from the U. S. Internal Revenue Department upon a satisfactory down payment, and for the settlement of Mr. Cobb's claim of $11,058.51 for services. [R. 817.]

The next day petitioner John E. Savage started negotiations, reached a satisfactory agreement with the U. S. Internal Revenue Department and Mr. Cobb and on June 24, 1942, purchased 600,472.65 shares of the stock pledged with Rose Lorraine upon the written representation of

respondent David G. Lorraine and Sara R. Lorraine and Lawrence Cobb that they would "not at any time assert any claim or title to said 600,472.65 shares of stock" [Defendants' Exhibit F, R. 104, 765; Appendix p. 2] for $12,500.00 plus $300.25 of U. S. Internal Revenue Stamp taxes, and subsequently advanced to The Lorraine Corporation $40,000. [R. 826.] If the Lorraines had not signed that letter of June 24, 1942 [Defendants' Exhibit F] petitioner John E. Savage would not have purchased the stock. [R. 858.]

Respondent David G. Lorraine brought this suit for declaratory relief against petitioners John E. Savage and The Lorraine Corporation, asking that he be declared to be the owner of 550,472.65 shares of said stock purchased by petitioner John E. Savage, that petitioner John E. Savage be declared to hold said stock *in trust* for respondent Lorraine, and that a receiver be appointed to preserve the assets and conduct the business of the petitioner The Lorraine Corporation until the final determination of this action. [R. 2-49.]

The trial court found that the petitioner John E. Savage was obligated under the agreement of June 1, 1942, to purchase said 600,472.65 shares for the respondent David G. Lorraine [Finding II, R. 171] and that upon said purchase of said shares by petitioner John E. Savage, 550,472.65 of said shares became the property of respondent David G. Lorraine [Finding IV, R. 173], subject to the right of the petitioner John E. Savage to retain legal title thereto until he shall be repaid the money expended by him for the purchase of the stock and the money advanced by him to The Lorraine Corporation [Finding V, R. 173], and that petitioner John E. Savage did not purchase said stock for himself and upon the written representation of respondent David G. Lorraine and Sara R.

Lorraine and Lawrence Cobb that they "would not at any time assert any claim or title to said 600,472.65 shares of stock." [Findings XXXI, XXXII, XXXIII, R. 178, 179.]

Petitioners objected to the findings but their objections were overruled. [R. 152.]

On November 30, 1943, judgment was entered against the petitioner John E. Savage, but the trial court retained jurisdiction to order an accounting or to appoint a receiver. [R. 184-188.] Petitioners filed their notice of appeal from the judgment on January 7, 1944. [R. 211.]

On January 6, 1944, the proceeding on respondent David G. Lorraine's motion for an accounting came on to be heard. [R. 863.] The accounting showed that petitioner John E. Savage had expended or incurred liability for $14,050.25 plus interest in and about the purchase of said stock. [R. 210.] It also showed that he had loaned to petitioner The Lorraine Corporation $40,000 in 1942. [Plaintiff's Exhibit 5, R. 901, 905.] It further appeared that he had been repaid $25,000 in October, 1943 [R. 901], and had reloaned to the corporation said $25,000 on January 5, 1944. [R. 905.] On January 10, 1944, the trial court made its Order in Accounting ordering 550,472.65 of said shares of stock transferred and delivered to respondent David G. Lorraine, upon the payment by him to petitioner John E. Savage of $13,750 plus interest, and upon payment by petitioner The Lorraine Corporation to petitioner John E. Savage of $15,542.50 plus interest. [R. 212.] The petitioners thereupon filed their notice of appeal from said Order in Accounting on February 7, 1944 [R. 303], and on February 9, 1944, filed in the Court below a motion for a writ of supersedeas to stay that portion of said order directing the transferring of said shares to respondent David G. Lorraine

until the determination of petitioners' appeal from said judgment, and the Court below granted petitioners' said motion.

On January 10, 1944, respondent David G. Lorraine's motion that a receiver be appointed for petitioner The Lorraine Corporation came on to be heard. [R. 999.] At the conclusion of the hearings the trial court found (1) that the petitioner John E. Savage controlled the board of directors of the petitioner The Lorraine Corporation by virtue of his exercise of the voting power of said 550,000 shares of stock; (2) that said petitioner The Lorraine Corporation had incurred the ill-will of the Douglas Aircraft Company, Inc., because it insisted that the Douglas Company should pay it $61,100 for goods sold and delivered to the Douglas Company, and (3) that petitioner John E. Savage had not released the security taken by him to secure his loans to petitioner The Lorraine Corporation. The trial court concluded therefrom that the business of petitioner The Lorraine Corporation "is in danger of being seriously damaged," and that "it is reasonably necessary that a receiver be appointed," and on January 26, 1944, appointed respondent L. F. Baash to be receiver of petitioner The Lorraine Corporation with authority to conduct the business. [Order Appointing Receiver, R. 276-285.]

Petitioners filed their notice of appeal from the Order Appointing Receiver on February 7, 1944. [R. 304.]

On January 26, 1944, there came on for hearing two orders to show cause. One was based on respondent L. F. Baash's Receiver's Petition No. 1 for Instructions as to signing an agreement with Douglas Aircraft Company, Inc., a copy of which was attached to the petition. [R. 288-292.] This agreement recited that a controversy had

arisen between the Douglas Company and The Lorraine Corporation as to prices which had been paid by the Douglas Company for goods delivered under former fully executed contracts, and provided that the Douglas Company and the respondent L. F. Baash, receiver, should settle the controversy by arbitration or otherwise. It further provided that upon the signing of the agreement, the Douglas Aircraft Company, Inc., would pay the receiver $20,000 on account. The other proceeding was based on respondent David G. Lorraine's motion that the receiver be directed to pay petitioner John E. Savage $15,670 out of the moneys about to be received from the Douglas Aircraft Company, Inc. [R. 296-7.]

No evidence was adduced, either by way of verified petition, affidavit or testimony of witnesses, that there was any legal merit to the Douglas claim. On the contrary, it appeared that the Douglas Company had bought and paid for the valves in question at the same rate they had contracted for 10,500 other identical valves. [R. 222-5, 1218.]

At the conclusion of the hearings, the trial court made its Order on Receiver's Petition for Instructions *in re* Proposed Contract with Douglas Aircraft Co., Inc. [R. 294], directing the receiver to execute said agreement, and its Order Concerning Payment to John E. Savage [R. 299], directing the receiver to pay John E. Savage $15,843.28. The agreement, which previously had been signed by the Douglas Company and the Douglas Company check for $20,000 which had previously been delivered to Mr. Elliott, the general counsel for the Douglas

Aircraft Company, Inc., and *one* of the attorneys for the respondent David G. Lorraine, were then delivered by Mr. Elliott to the receiver. [R. 1085, 1163, 1164.] Petitioners filed their notice of appeal from these two orders on February 7, 1944. [R. 304, 306.]

On May 8, 1944, Receiver's Petition for Instructions No. 2 [R. 1190-1200] came on to be heard. Attached to the petition was a proposed agreement with Douglas Aircraft Company, Inc., in which it is agreed that the Douglas Company was indebted to The Lorraine Corporation in the amount of $61,109.90 as of the date of the receivership; that the Douglas Company had since paid $20,000 to the receiver, leaving the balance of $41,109.90. [R. 1198.] The agreement recites that during the year 1943 The Lorraine Corporation had sold and delivered to the Douglas Company 3972 valves at an agreed price of $23.50, which had been paid. [R. 1195.]

The agreement further recites that the controversy mentioned in the agreement of January 26, 1944, executed under the Order on Receiver's Petition for Instructions *in re* Proposed Agreement with Douglas Aircraft Company, Inc., hereinabove mentioned, "arose by reason of the contention of Douglas that *excessive price* had been received and charged by The Lorraine Corporation" for valves delivered [R. 1195], and provided that such controversy be settled by the repayment by the receiver to the Douglas Company of $7.00 per valve, or $27,804 in all.

The evidence showed that the Douglas Company had paid $32 per valve for the valves made under the first order, $23.50 per valve for those made under the next

four orders, which totaled 4000 valves and included the 3972 valves on which the price was claimed to be excessive, $23.50 per valve on the next three orders totaling 10,500 valves, and $18.50 per valve on a new order accepted by the receiver but on which no valves had yet been made at the time of the hearing. [R. 1213, 1214.]

No evidence was adduced, either by way of verified petition, affidavit or testimony of witnesses, that there was any legal merit to the Douglas claim, and when petitioners objected on the ground that there was no legal claim, the trial court refused to hear any testimony in that regard. [R. 1205.] Indeed, Mr. Elliott himself had previously testified that he did not know whether the position of the Douglas Aircraft Company was well taken or not and that he made no investigation to find out [R. 1101-2], while the respondent receiver testified that he had talked to some of the officers of the Douglas Aircraft Company, but they did not even discuss the ground upon which the Douglas Company claimed the $64,000. [R. 1157.] Nevertheless, the respondent receiver recommended that he be authorized to pay the Douglas Company $27,804. [R. 1211, 1196.]

The trial court made its Order on Receiver's Petition No. 2 for Instructions [R. 1243] ordering the receiver to execute the contract, which caused the respondent receiver L. F. Baash to pay out to the Douglas Aircraft Company, Inc., $27,804 of the funds of petitioner The Lorraine Corporation. Petitioners filed their notice of appeal from said Order on Receiver's Petition No. 2 for Instructions on May 10, 1944. [R. 1245.]

Specifications of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In refusing to consider the sufficiency of the evidence to support the findings in the light of the rule that evidence to establish an implied trust must be clear, convincing and conclusive.

2. In refusing to apply the doctrine of estoppel in favor of the petitioner John E. Savage.

3. In refusing to vacate the order of the District Court appointing a receiver for petitioner The Lorraine Corporation on the motion of respondent David G. Lorraine to remedy a situation caused by said respondent David G. Lorraine and the Douglas Aircraft Company, Inc., a debtor of The Lorraine Corporation.

4. In refusing to vacate the order of the District Court directing the respondent receiver L. F. Baash to pay the Douglas Aircraft Company, Inc., the sum of $27,804 out of the assets of petitioner The Lorraine Corporation without any proof that such sum or any part thereof was owing.

Reasons for Granting the Writ.

QUESTION 1. (a) The decision of the Circuit Court of Appeals herein is in conflict with the following decisions of this Court:

Prevost v. Gratz, 19 U. S. 481 (5 L. Ed. 311);

Allen v. Withrow, 110 U. S. 120 (28 L. Ed. 90).

Prevost v. Gratz was an action to establish a trust. This Court, speaking through Mr. Justice Story, said on pages 498-9 (L. Ed., p. 315):

> "Now, disguise the present case as much as we may, and soften the harshness of the imputation as

> much as we please, it cannot escape our attention, that if the plaintiff's case be made out, there was a meditated breach of trust, and a deliberate fraud practiced by M. Gratz. . . . If the fraud were clearly made out, there would certainly be an end to all inquiry, as to the motives which could lead to so dishonorable a deed between such intimate friends. *But the fraud is not clearly made out; it is inferred from circumstances in themselves equivocal,* and from the absence of proofs, which it is supposed must exist, . . ." (Italics ours.)

Allen v. Withrow was also an action to establish a trust. This Court, speaking through Mr. Justice Field, said on pages 129-130 (L. Ed., p. 94):

> "So far as the personal property conveyed to Withrow is concerned, it must be admitted that a trust may be established by parol evidence; but *such evidence must be clear and convincing: not doubtful, uncertain and contradictory, as in this case.*" (Italics ours.)

(b) The decision of the Circuit Court of Appeals herein is in conflict with the following decisions of the other Circuit Courts of Appeals:

> *Neely v. Boyd,* 145 Fed. R. 172 (C. C. A. 8th);
>
> *Teter v. Visquesney,* 179 Fed. R. 655 (C. C. A. 4th).

Neely v. Boyd was an action to establish a trust in property purchased by the defendant with his own money, plaintiff alleging that defendant had agreed to hold title until plaintiff should reimburse defendant for the purchase price at some future date not fixed. The Circuit Court of Appeals for the Eighth Circuit held that clear and

satisfactory proof was required, that there was no evidence that the defendant had bought the property for the plaintiff, and reversed the District Court with direction to dismiss the complaint.

In *Teter v. Visquesney* the Circuit Court of Appeals for the Fourth Circuit held, quoting section 1040 of Pomeroy's Equity Jurisprudence on page 661:

> "Where the trust does not appear on the face of the deed or other instrument of transfer, a resort to parol evidence is indispensable. It is settled by a complete unanimity of decision that such evidence must be clear, strong, unequivocal, unmistakable, and must establish the fact of the payment by the alleged beneficiary beyond a doubt."

(c) The decisions of the Circuit Court of Appeals herein is in conflict with the decisions of the California Supreme Court:

Sheehan v. Sullivan, 126 Cal. 189 (58 P. 543);

Breitenbucher v. Oppenheim, 160 Cal. 98 (116 P. 55);

Goodfellow v. Goodfellow, 219 Cal. 548 (27 P. (2d) 898).

The decisions of this Court in

Erie R. Co. v. Tompkins, 304 U. S. 64 (82 L. Ed. 1188), and

Ruhlin v. New York L. Ins. Co., 304 U. S. 209 (82 L. Ed. 1291),

hold that in cases where the jurisdiction of the Federal Courts depends solely upon the diversity of citizenship of the parties, the Federal Courts are bound to follow the decisions of the State Courts as to substantive rules

of common law, in both law and equity cases, and that where the lower Federal Court in such cases refuses to follow the law of the State as declared by its highest court, certiorari to the Supreme Court of the United States will be granted to review the action of the lower Federal Courts.

In the case at bar, all of the transactions took place in California, and the only reason for the jurisdiction of the Federal Courts was the diversity of citizenship of the parties.

Grand Trunk Western R. Co. v. Chicago & W. Ind. R. Co., 131 Fed. (2d) 215, was a case to establish a trust. All the transactions occurred in Illinois, and the jurisdiction of the Federal Courts arose solely because of diversity of citizenship of the parties. The Circuit Court of Appeals for the Seventh Circuit held that to establish a trust, the proof must be clear and convincing, as required by the law of Illinois.

In *Sheehan v. Sullivan, supra*, the California Supreme Court held that to establish a trust by parol, the evidence must be clear, convincing and conclusive, and the judgment of the lower court establishing the trust was reversed.

In *Breitenbucher v. Oppenheim, supra*, the California Supreme Court held that to establish a resulting trust, the evidence must be clear, satisfactory and convincing, citing *Sheehan v. Sullivan, supra.*

In *Goodfellow v. Goodfellow, supra*, the California Supreme Court, again citing *Sheehan v. Sullivan*, held that to establish a trust, the evidence must be clear, convincing and conclusive.

In the *Goodfellow* case, the plaintiff and defendant were brothers. The plaintiff negotiated the purchase of the prop-

erty in dispute from one Barritt, but was unable to raise the purchase price. It was then agreed that the defendant should purchase the property with his own money and take title in his own name, which was done. The plaintiff alleged that he had an agreement with defendant to the effect that the deed to defendant should be made to defendant as security for the repayment to him of the purchase price. The defendant answered that he bought the land with his own money and for his own benefit, and denied that he was to hold it as security for the repayment of the purchase price.

The California Supreme Court held that in order to establish that the defendant held the property in trust or as security, the testimony must be clear, convincing and conclusive. The Supreme Court further held that the alleged promise of plaintiff to repay the defendant at some undetermined future time was so vague, uncertain and indefinite an agreement that it could not be held sufficient to create an indebtedness for which there might be security.

QUESTION 2. (a) The decision of the Circuit Court of Appeals herein is in conflict with the decisions of this Court in

Dickerson v. Colgrove, 100 U. S. 578 (25 L. Ed. 618).

In that case, one Chauncey died, leaving the property in question to his son and his daughter. The daughter conveyed the entire premises to one Morton, who in turn conveyed them to the defendant. Subsequent to the conveyance by the daughter to Morton, the son wrote a letter to his sister, the daughter of the original owner, wherein he stated that he would never assert any claim to the property. The contents of this letter were disclosed to

Morton, who, relying thereupon, subsequently gave a warranty deed to the entire premises to the defendant.

This Court held (page 580):

> "The estoppel here relied upon is known as an equitable estoppel, or estoppel *in pais*. The law on the subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted."

(b) The decision of the Circuit Court of Appeals herein is in conflict with the decisions of other Circuit Courts of Appeals.

Jones Store Co. v. Dean, 56 Fed. (2d) 110 (C. C. A. 8th).

In this case the Circuit Court of Appeals for the Eighth Circuit held that a promise to abandon an existing right, acted upon by another to his disadvantage, will operate as an estoppel *in pais.*

(c) This being a case where the only basis of Federal Court jurisdiction is because of diversity of citizenship, the law of California, where all the transactions occurred, would apply. *Erie R. Co. v. Tompkins, supra; Ruhlin v. New York L. Ins. Co., supra.*

The decision of the Circuit Court of Appeals herein is in conflict with the law of California.

State Loan Co. v. Cochran, 130 Cal. 245 (62 P. 466);

Kemper v. Industrial Acc. Com., 177 Cal. 618 (171 P. 426);

Banning v. Kreiter, 153 Cal. 33 (94 P. 232).

In *State Loan Co. v. Cochran, supra,* and *Kemper v. Industrial Acc. Com., supra,* the California Supreme Court held the promise to waive the statute of limitations constituted the basis for an estoppel *in pais,* and would estop the promisor from thereafter asserting his right.

In *Banning v. Kreiter, supra,* the owner of real estate promised that a strip of land used as an alley-way would not be closed off, and relying on such promise, the defendant bought the adjacent lot. The promisor now brings an action to recover possession of the land used as the alley-way, and the defendant plead estoppel *in pais.* The trial court held for the plaintiff, but the Supreme Court held that plaintiff's promise to abandon his right supported an estoppel *in pais,* if the defendant relied upon it, and reversed the judgment.

QUESTION 3. The decision of the Circuit Court of Appeals herein involves an important question which should be settled by this Court. Petitioner has been unable to find any decisions bearing upon the question, either in harmony or in conflict with the decision of the Court below. But the issue is so elemental and the decision is so inequitable and so shocking that it should not be allowed to stand.

In 1943, under the management of petitioner John E. Savage, the petitioner The Lorraine Corporation was prosperous and making money, and was able to repay Mr. Savage $25,000 of his loan on October 20, 1943. [R. 901.] But on October 28, 1943, respondent David G. Lorraine associated as one of his attorneys herein Harry W. Elliott, Esq., who was the general counsel for the Douglas Aircraft Company, Inc. [R. 147-1085.] Four days later, on November 1, 1943, the Douglas Aircraft Company, Inc., failed to pay its October account to

the petitioner The Lorraine Corporation, and on November 30, 1943, it failed to pay both its October and November accounts, totaling $64,572.34 [R. 254], of which $61,100 was for valves. [R. 267.] The District Court stated for the record that *Mr. Elliott "was instrumental in preventing the payment of the $61,100."* [R. 995.] Petitioner The Lorraine Corporation immediately referred the matter to its attorney, who tried practically every day to arrange a conference with Mr. Elliott up to December 29, 1944, but Mr. Elliott refused to discuss the matter. [R. 254-267.] On said December 29, 1944, Mr. Elliott and the other attorneys for plaintiff filed their motion for receivership herein [R. 195-6], alleging in substance that The Lorraine Corporation had alienated the goodwill of the Douglas Aircraft Company, Inc. By this time the working capital of The Lorraine Corporation was used up, because of the withholding of the $64,572.34 by the Douglas Aircraft Company, Inc., its bank balance was down to $517 and its payroll overdue. [R. 907.] It applied to its bank for a loan of $15,000 but owing to the application for receivership the bank refused to make the loan. [R. 917.] The Lorraine Corporation had now been forced by Mr. Elliott into the position where it either had to close up, which would inevitably lead to the granting of his motion for a receiver, or it had to turn to petitioner John E. Savage again for financial assistance. However, in view of the application for a receiver, Mr. Savage would not make the loan unless he received security, and the taking of security was considered by the trial court to be so wicked as to amount to mismanagement, and resulted in the order appointing the receiver. [R. 276-285.]

Furthermore, Mr. Elliott arrived in court on the hearing for a receivership with a check for $20,000 payable

to The Lorraine Corporation, *which he testified was due to The Lorraine Corporation* from the Douglas Aircraft Company, Inc. [R. 1085.] At the same time he filed an affidavit of Arthur J. Hogan, of the Douglas Aircraft Company legal staff, to the effect that the Douglas Company would make available to The Lorraine Corporation said $20,000 *"if a receiver or receivers acceptable to the Douglas Aircraft Company, Inc.,* were to be placed in control of The Lorraine Corporation." [R. 268.] *Mr. Elliott also testified that he would not give the check to The Lorraine Corporation so long as Mr. Savage controlled its management,* and would only surrender it on condition that Mr. Savage be paid out of it "what is coming to him by reason of the judgment herein." [R. 1104.]

The trial court thereupon appointed a receiver acceptable to Mr. Elliott, who immediately prepared and filed, four days later, his petition to accept the $20,000, returnable January 26, 1944. [R. 286.] At the same time Mr. Elliott and the other attorneys for plaintiff filed their motion that the receiver use $15,670 of the $20,000 to pay Mr. Savage the amount due him under the judgment, returnable the same time as was the receiver's petition. [R. 296.] The trial court granted both motions [R. 293, 299], Mr. Elliott gave the $20,000 check to the receiver, who tendered $15,843.28 thereof to Mr. Savage, who declined the tender.

The Circuit Court of Appeals held this shocking conduct of the trial court to be "of secondary consequence" and "of little more than academic interest to" petitioner John E. Savage—not mentioning the petitioner The Lorraine Corporation and its stockholders other than Messrs. Savage and Lorraine—and "without merit." [R. 1260.] Such de-

cision by the Court below is so contrary to all the rules of equity that it should not be allowed to stand as a precedent, but should be reversed by this Court.

QUESTION 4. This question is interwoven with Question 3, and the decisions of the Circuit Court of Appeals below is in conflict with the following decisions of this Court:

Wiswall v. Sampson, 55 U. S. 52 (14 L. Ed. 322);

Porter v. Sabin, 149 U. S. 473 (37 L. Ed. 815);

Richmond v. Irons, 121 U. S. 27 (30 L. Ed. 864).

In *Wiswall v. Sampson, supra*, this Court held that anyone having claims against a receivership should apply to the Court for permission to bring suit to establish his claim, or to apply for a hearing to be examined as to the validity of his claim.

In *Porter v. Sabin, supra*, this Court held that "any claim against the receiver or the corporation, the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of." (P. 479; L. Ed., p. 818.)

In *Richmond v. Irons, supra*, this Court held (p. 66; L. Ed., p. 877):

> "No person is entitled to recover as a creditor who does not come forward to present his claim. The only proof in reference to such claims in the present case consisted in affidavits made by . . . one of the attorneys of the receiver, that he had made an investigation of all claims" and that the receivership estate "is justly indebted to the several persons mentioned. . . . *These claims should have been disallowed.*" (Italics ours.)

Indeed, the Circuit Court of Appeals below has itself recognized and enforced the rule that a claimant against a receivership must prove his claim under the recognized rules of evidence. In the case of

Moore v. McDuffie, 71 Fed. (2d) 729,

it affirmed the ruling of a special master and the District Court holding that a claim against a receivership must be disallowed when

> "There is no evidence upon which to base any allowance." (P. 730.)

A reading of the record discloses that respondent David G. Lorraine employed the general counsel for the Douglas Aircraft Company, Inc., as one of his attorneys herein; that immediately the Douglas Company stopped paying for the goods received by it from petitioner The Lorraine Corporation until it had accumulated an unpaid account of $64,572.34; that the Douglas Company and its general counsel refused even to discuss the matter with petitioner The Lorraine Corporation and its counsel, but collaborated with respondent David G. Lorraine to secure the appointment of a receiver herein, contingent upon the recognition by petitioner The Lorraine Corporation that the Douglas Company had a claim against The Lorraine Corporation by reason of *excessive prices* having been paid for valves by the Douglas Company under prior fully executed contracts. [R. 268-1102.]

The Douglas Company then submitted a proposed agreement to arbitrate or otherwise settle the matter to the receiver, who petitioned the District Court for instructions. [R. 286.] A hearing was held, and your petitioners appeared and objected, and pointed out to the District Court that the alleged claims, not verified, were based

solely upon the contention of the Douglas Company that the prices paid under wholly executed written contracts were "excessive," and there was no legal basis for the claims.

No proof was offered by the receiver, but your petitioners called the receiver as a witness, and he testified that he had talked with the Douglas Company on January 25, 1944, the day after he had verified the petition, but that the matter of the ground upon which the Douglas Company claimed the $64,000 was not even discussed. [R. 1157.] Mr. Elliott had previously testified that he had made no investigation into the merits of the claim and didn't purport to make any statement as to whether it was well-founded or not. [R. 1101-2.]

Nevertheless, the District Court stated:

> "I will approve a settlement or arbitration *no matter who is right,* I will take the responsibility on that." (Italics ours.) [R. 1148.]

and ordered the receiver to negotiate a settlement. [R. 294.] This was on January 26, 1944, and your petitioners filed their notice of appeal on February 7, 1944. [R. 305.]

The respondent receiver and the Douglas Company then negotiated the "settlement," whereby the receiver was to pay out of the funds of The Lorraine Corporation $27,804 to the Douglas Company, which came on for hearing for approval. Again petitioners objected that there was no proof of any money whatsoever owing to the Douglas Company. Whereupon the trial court said:

> "Well, gentlemen, there is one question which we are not going to reopen at the present time, and that is on the advisability of a compromise, because that

matter was thrashed out a long time ago when permission was asked to enter into negotiations. That order has become final and no appeal has been taken."

As pointed out above, the order was not final and an appeal had been taken.

The receiver was called as a witness and testified:

"Q. Prior to the preparation of that contract did you, *through your attorney,* conduct negotiations with the Douglas Aircraft Company? A. Yes.

Q. And caused an investigation to be made as to the matters referred to in that contract? A. Yes.

Q. In your opinion, Mr. Baash, is the contract, a copy of which is attached to your petition No. 2 for instructions, a proper and provident contract for you to enter into as Receiver? A. Yes." [R. 1211.]

This brings the case squarely within the doctrine of *Richmond v. Irons, supra,* that such testimony is not sufficient.

The attorney for respondent David G. Lorraine then stated that he was not opposed to "this compromise." [R. 1239.]

The District Court then stated:

"I am not satisfied, despite the positiveness of Mr. Savage, that the testimony of Mr. Lorraine could not have been used to offset any suggestion that the contract is completely executed." [R. 1240-1.]

But Mr. Lorraine was not called to testify for such purchase, and it is highly improper for a Court to decide a case on testimony that might have been but was not produced.

Apparently the District Court, disregarding the decisions of this Court and the Circuit Court of Appeals for the Ninth Circuit, thought that a receiver had the right to conduct the business the same as any individual might conduct his own business. We submit that such is not the law. *An individual has the right to give away his own property if he sees fit, but a receiver holds the property of his receivership estate in trust, and has no right to give it away, and the Court appointing him has no right to direct him to do so.*

Nevertheless, the District Court directed the receiver to pay $27,804 of petitioner The Lorraine Corporation's money to the Douglas Company [R. 1243-4], at the same time refusing to grant petitioners a stay until they could apply to the Circuit Court of Appeals for relief. [R. 1242.]

A reading of the record gives one the distinct impression that the payment of the $27,804 to the Douglas Company might have been its compensation for aiding respondent David G. Lorraine to oust petitioner John E. Savage from the control of petitioner The Lorraine Corporation.

Concerning this disposal of the assets of the receivership estate, the Circuit Court of Appeals below said simply that it was a matter of "secondary consequence," of "little more than academic interest to" Mr. Savage, and "without merit," without even mentioning petitioner The Lorraine Corporation and its other stockholders whose money was given away. [R. 1260.]

Conclusion.

The petition for a writ of certiorari should be granted.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari issue out of this Honorable Court to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause.

Dated Los Angeles, California, May 25, 1945.

Respectfully submitted,

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Certificate of Counsel.

We, Earl C. Demoss and A. J. O'Connor of Los Angeles, California, hereby certify that we are the attorneys and counsel for John E. Savage and The Lorraine Corporation, the petitioners in the above entitled proceeding, and that the foregoing petition for Writ of Certiorari is not interposed for purposes of delay or vexation, but is, in our opinion, well founded in law and fact and proper to be filed herein.

EARL C. DEMOSS,
A. J. O'CONNOR,

Attorneys for Petitioners.